

NPDES Litigation Update

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Permit Writers' Conference

July 2013



Internal Permit Limits and Conditions

Iowa League of Cities v. EPA

- 8th Circuit found that a 2007 EPA memorandum and a 2011 EPA letter contained a new “mixing zone rule” in violation of the APA.
 - Court held that EPA’s approach to mixing zones was not obviously precluded by the plain meaning of the CWA and, should EPA wish to institute the rule, it may seek to do so using appropriate procedures.
- 8th Circuit also found that EPA letters contained a new “blending rule” in violation of the APA.
 - Court found that EPA letter’s statement on blending exceeded statutory authority by effectively imposing secondary treatment requirements on flows within facilities.

711 F.3d 844 (8th Cir. 2013).

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Iowa League of Cities

- In this case, EPA was sued over 2 letters we issued in 2011 and a guidance memo from 2007.
- The letters, which responded to specific questions in letters from Senator Grassley, addressed a number of issues:
 - The first issue was the use of mixing zones to establish WQBELs for bacteria indicators, which included a discussion of a 2007 memo on the issue.
 - The letter and the memo strongly discouraged the use of mixing zones for WQBELs for bacteria indicators;
 - The 8th Circuit vacated the mixing zone discussion in the letter and vacated the 2007 memo constituted improper rulemaking without notice and comment under the APA
 - The second issue the court looked at was how the bypass provision applies to flows sent to wet weather treatment units at POTWs.
 - In the letter, EPA said that diverting flows around secondary treatment, even where the flows were partially treated by a wet weather treatment unit, violated the bypass provision of a permit unless the wet weather treatment unit performed like a secondary treatment unit.
 - The 8th Circuit vacated the discussion in the letter because EPA had not gone through notice and comment under the APA AND held that the approach violated the CWA insofar as it would impose secondary treatment limitations internally.
 - EPA is still considering whether to petition the Supreme Court for review of this decision and/or to issue a clarification on what the decision really means for permit writers.

Weiss, Kevin

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From: Weiss, Kevin
Sent: Monday, October 28, 2013 10:11 AM
To: Witt, Richard
Subject: FW: Region 7: WEF / 4 States Meeting Agenda
Attachments: Agenda_4-State_GA_Meeting_11-13-2013.docx

FYI - Region 7 will be meeting with States on Nov 13 - 8th circuit decision is on the agenda.

-----Original Message-----

From: Curtis, Glenn
Sent: Monday, October 28, 2013 10:07 AM
To: Weiss, Kevin
Cc: Bosma, Connie
Subject: Region 7: WEF / 4 States Meeting Agenda

Fyi - see agenda for meeting with 4-states - WEF. Let me know if you or whomever might need help with any other specifics.

Also - would like to talk on 8th circuit direction

thanks

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Weiss, Kevin

From: Weiss, Kevin
Sent: Thursday, April 04, 2013 4:20 PM
To: Curtis, Glenn
Subject: FW: BioActiq

No

From: Curtis, Glenn
Sent: Thursday, April 04, 2013 3:18 PM
To: Weiss, Kevin
Subject: BioActiq

Any new statements to be said on 8th circ dec?

Weiss, Kevin

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From: Weiss, Kevin
Sent: Wednesday, March 27, 2013 8:28 AM
To: Curtis, Glenn
Subject: FW: Desk statement for adverse decision in a Clean Water Act case
Attachments: DESK STATEMENT on Iowa League of Cities CWA decision 3-26-13.docx

From: schroer, lee
Sent: Tuesday, March 26, 2013 5:40 PM
To: Washington, Evelyn; Weiss, Kevin
Subject: FW: Desk statement for adverse decision in a Clean Water Act case

fyi

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From: Smith, Kristi
Sent: Tuesday, March 26, 2013 5:39 PM
To: Johnson, Alisha; Belknap, Andra; Kika, Stacy
Cc: schroer, lee; Witt, Richard
Subject: Desk statement for adverse decision in a Clean Water Act case

Hello. I've taken over for Mindy Kairis as the Special Assistant in the OGC Front Office, and she indicated that you were her primary press contacts for OGC matters.

Attached is a desk statement for an adverse decision that EPA received yesterday in a Clean Water Act case. This should help if you receive any press inquiries regarding this decision, but please feel free to contact me, Lee Schroer, or Richard Witt (OGC attorneys cc'ed here) if you need more information.

- Kristi

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"Internal-Not for Distribution – This is not a Press-Release"

Decision by US Court of Appeals for the Eighth Circuit: Iowa League of Cities v. EPA

We understand that the typical course of action where press inquiries involve or affect matters pending before a court is for EPA press officers to coordinate with their counterparts at DOJ and, in accordance with DOJ's standard practice, to decline to comment on matters in litigation. However, in OGC's judgment this event may generate some interest from the press, so this information is being provided as background should EPA receive any questions.

Desk Statement

On March 25, 2013, the U.S. Court of Appeals for the Eighth Circuit vacated portions of two letters that EPA sent to Senator Charles Grassley on June 30, 2011 and September 14, 2011, regarding certain requirements under the Clean Water Act (CWA). The Court found that the June 30 letter included a new mixing zone rule for waters designated for primary contact recreation issued in violation of the requirements of Administrative Procedures Act (APA). With regard to the September 14 letter, the Court found that it included a new rule that unlawfully applied the bypass regulations to certain flows at POTWs diverted from secondary ("biological") treatment to other treatment units during wet weather conditions, that was issued in violation of both the APA and CWA. EPA is currently reviewing the Court's decision.

Background

Both EPA letters were sent by Nancy Stoner, Assistant Administrator for Water, to Senator Grassley of Iowa, responding to questions the Senator had asked about mixing zones and blending under the Clean Water Act.

In the June 30, 2011 letter, Nancy Stoner addressed EPA's policy regarding the use of mixing zones for bacteria in waters designated for swimming. Mixing zones are small areas near discharge outfalls in which water quality criteria may be exceeded if the designated uses of the water will still be protected. Mixing zones are generally used when protection of aquatic life is at issue (e.g., fish may swim in and out of a small mixing zone without harm). The Stoner letter explained that EPA's position, as expressed in a 2008 EPA memorandum, is that mixing zones that allow for elevated levels of bacteria in waters designated for human recreation should not be permitted because they could result in significant human health risks. The Iowa League of Cities argued that the Stoner letter (and EPA memorandum) imposed new regulatory requirements without following the notice and comment procedures required under the APA, essentially prohibiting mixing zones in waters designated for primary contact recreation. The Court agreed with the League and vacated what the Court called EPA's "mixing zone rule." However, the Court noted that EPA's approach to mixing zones is not obviously precluded by the plain meaning of the CWA and, should EPA wish to institute the rule, it may seek to do so using the appropriate procedures.

The September 14, 2011 letter discussed whether diversion of peak flow to certain treatment processes would be subject to the EPA NPDES bypass regulation. The letter stated that generally flows that were diverted around the biological treatment units would constitute a

bypass unless the diverted flow was routed to a unit that was itself a biological treatment unit. The Iowa League of Cities argued that EPA's statements amended the existing bypass regulations and secondary treatment regulations without providing the statutorily required notice and opportunity for comment. The court agreed that EPA's letter statement constituted a new "blending" rule in violation of the APA. The Court also held that EPA's interpretation of the bypass regulation violated the CWA because it effectively imposed secondary treatment requirements on flows before the point of discharge that exceeded EPA's statutory authority.

EPA is reviewing the decision and discussing potential next steps with the Department of Justice.

Possible Questions and Answers

How does EPA plan to respond to the court's decision? It is too early to speculate on what EPA may do because the Agency is still in the process of reviewing the decision and considering its options, in consultation with DOJ.

Does this mean sources can start polluting in water that States have designated for recreational uses like swimming? No, States in establishing water quality standard may allow the use of mixing zones as an element of a standard. States must submit their water quality standards to EPA for review and approval or disapproval. Consequently, EPA will have the opportunity to review any changes to State water quality standards that would allow mixing zones for pollutants in areas that the State has designated for recreational uses. In addition, EPA may review and object to proposed Clean Water Act discharge permits if they included a mixing zone that would fail to protect water quality standards.

OGC Contacts

Richard Witt (202-564-5496) and Lee Schroer (202-564-5476)